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In the Supreme Court of the United States

OCTOBER TERM, 1954

LONNIE AUFFONTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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OPINION BELOW

The opinion of the court of appeals (Pet. 15) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1955 (Pet. 15). The petition for a writ of certiorari was filed on May 12, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, after a cumulative sentence on multiple counts of an indictment has been imposed and several of the sentences have been served, a district

court may, under 18 U.S.C. 3651, grant probation as to the unserved sentences.

STATUTE INVOLVED

The pertinent portion of 18 U.S.C. 3651 provides:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.
>
> Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both such fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.
>
> The court may revoke or modify any condition of probation, or may change the period of probation.

STATEMENT

Convicted on counts two to ten of a ten-count indictment for violation of the Harrison Narcotic

Act (R. 6), petitioner was sentenced to five years on each count, to run consecutively (R. 7, 19). On counts six to ten, execution of the sentences was suspended and petitioner placed on probation to commence after expiration of the sentences imposed on counts two to five (R. 7).

Petitioner began serving his sentence on count two on October 14, 1949 (R. 20). On July 14, 1953, while still serving count two, he filed a motion to stay execution of sentence, modify it, and place him on probation (R. 12).

The district court acknowledged that its custom had been to grant probation, when appropriate, on unserved consecutive sentences of a multiple-count indictment until the decision of the Court of Appeals for the Eighth Circuit in *Phillips* v. *United States*, 212 F .2d 327, held that it had no power to do so. The motion was therefore denied for want of power. (R. 15.)

On appeal, the court of appeals adhered to its decision in the *Phillips* case, *supra*, with one judge dissenting (Pet. 15).

DISCUSSION

We agree with petitioner that the instant holding is in direct conflict with that of the Ninth Circuit in *Kirk* v. *United States*, 185 F. 2d 185 (Pet. 5). The Eighth Circuit in its opinion in the instant case (Pet. 17) and in the *Phillips* case, *supra*, at pages 331, 355, recognized the contrary holding of the Ninth Circuit. It pointed out that its decision in the *Phillips* case, *supra*, was being followed in the Fourth Circuit (Pet. 17, 18). *Mann* v. *United*

States, 218 F. 2d 936 (C.A. 4); *Stern* v. *United States*, 219 F. 2d 263 (C.A. 4).[1]

The diverging point in this conflict of circuits is whether a cumulative sentence is, for the purposes of probation, the same as a general sentence, as to which the law is settled. In *United States* v. *Murray* and *Cook* v. *United States*, 275 U.S. 347, this Court decided there was no power in the federal courts to grant probation under the Probation Act of 1925, 43 Stat. 1259, upon which the statute here involved is based, after the defendant has served any part of the sentence. The *Phillips* case, *supra* at 332, points out that this Court was dealing with a cumulative sentence in the *Cook* case, so that the question in the instant case has been before the Court. However, in the briefs before the Supreme Court and in the opinion itself at page 351, the sentence of Cook is referred to merely as "a total of fourteen years and nine months," and no issue was made of its cumulative nature.

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[1] We do not believe, however, that the Tenth Circuit is in conflict with the Eighth and Fourth Circuits, as alleged by petitioner (Pet. 5, 6), as the same factual basis for a decision has not arisen there. *Kelley* v. *United States*, 209 F. 2d 638 (C.A. 10), involved a prisoner who was serving a sentence on one indictment and sought suspension of sentence on another indictment he had not yet begun to serve. *White* v. *Steigleder*, 37 F. 2d 858, 859 (C.A. 10), does contain dicta to the effect that a cumulative sentence is severable for purposes of probation, but the case actually held that the intervention of an appeal did not affect the power of the district courts to grant probation, as the appellee, whose convictions were upheld on appeal, still had the status of an offender whose sentence had not begun.

In view of the conflict between the Ninth Circuit and the Eighth and Fourth Circuits, we do not oppose the granting of certiorari in this case.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

MAY 1955.

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